

TITLE MC-12

DEPARTMENT OF PLANNING

SUBTITLE 08  
BOARD OF VARIANCES AND APPEALS

CHAPTER 801

RULES OF PRACTICE AND PROCEDURE  
FOR THE BOARD OF VARIANCES AND APPEALS

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## SUBCHAPTER 1

### GENERAL PROVISIONS

§12-801-1 Title. The rules in this chapter shall be known as the "Rules of Practice and Procedure for the Board of Variances and Appeals" for the County of Maui. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-2 Authority. The rules herein are established pursuant to the provisions of the charter of the County of Maui, the Maui County Code and chapters 91 and 92 of the Hawaii Revised Statutes. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: §HRS 91-2)

§12-801-3 Purpose. These rules govern practice before, and procedures of, the Maui County department of planning, board of variances and appeals, and set forth general rules applicable to proceedings before the board. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-4 Construction. These rules and regulations shall be construed to secure the just and efficient determination of proceedings before the board. These rules and regulations should be read in conjunction with the provisions of the Hawaii Revised Statutes, the charter of the County of Maui and the Maui County Code. If there is a conflict between state law, the Charter of the County of Maui, or the Maui County Code and the provisions herein, state law, the Charter of the County of Maui, or the Maui County Code shall govern.

If there are conflicts between the general provisions herein and specific rules of any other chapters, the specific rules shall govern. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-5 Definitions. The following definitions shall apply for all matters before this board:

"Able to vote" means when a member of the board is present at a meeting of the board and is not disqualified

from voting, pursuant to section 12-801-23, on the variance or appeal before the board at that hearing.

"Agency" means any agency, board, commission, department or officer of the county or state government, including the board.

"Agency hearing" means a hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14, Hawaii Revised Statutes.

"Applicant" means a person who seeks permission or authorization which the board may grant under statute or ordinance; and a person seeking relief not otherwise designated in these rules and regulations.

"Board" means the Maui County department of planning, board of variances and appeals.

"Contested case" means a proceeding in which legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

"County" means the County of Maui.

"Deadlock" means when a majority of the membership to which the board is entitled is present at a hearing and able to vote, as defined herein, but is unable to grant or deny the variance or appeal at that hearing by an affirmative vote of a majority of the membership to which the board is entitled.

"Department" means the department of planning of the County.

"Director" means the director of planning of the County or the director's authorized representative.

"Government record" means information maintained by an agency in written, auditory, visual, electronic or other physical form, or as otherwise defined in chapter 92F, Hawaii Revised Statutes, as amended.

"Hearing officer" means any person or persons designated and authorized by the board to conduct a contested case hearing, to take testimony, and to report findings of fact and conclusions of law with recommendations to the board on matters that are within the jurisdiction of the board.

"Meetings" means the convening of the board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.

"Party" means any person named or admitted as a party.

"Person" means any agency, individual, partnership, firm, association, community group, trust, estate, private corporation, or other legal entity, whether or not incorporated, including governmental departments or agencies.

"Proceeding" means any matter brought before the board over which the board has jurisdiction. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

## SUBCHAPTER 2

### ORGANIZATION AND PARLIAMENTARY RULES

§12-801-6 Office. The office of the board is at 250 South High Street, Wailuku, Maui, Hawaii 96793. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-7 Communications. Unless otherwise specifically directed, all communications to the board shall be directed to the office of the board at the Kalana Pakui (County Annex), 250 South High Street, Wailuku, Hawaii 96793. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-8 Membership. The board is comprised of nine members, appointed by the mayor and approved by the council. Each member serves on the board for a period of five years. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: Charter §13-2)

§12-801-9 Business year. The business year for the board shall run from April 1 to March 31. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: Charter §13-2)

§12-801-10 Meetings. (a) The board may meet and exercise its powers anywhere within its jurisdiction. Unless otherwise provided by law, all meetings shall be open to the public.

(b) The board shall base the parliamentary procedures for conducting its meetings on the revised edition of Robert's Rules of Order. If there is a conflict between the provisions herein and Robert's Rules, the provisions herein shall apply.

(c) General meetings are scheduled to be held at least twice a month on the second and fourth Thursday of each month as necessary. This schedule may be altered by vote of the board and the regular meeting held elsewhere and on a different day or time when necessary to enable the board to effectively conduct its business.



(d) The board shall allow all interested persons an opportunity to submit data, views, arguments or present oral testimony on any agenda item in an open meeting. The board may provide for the recordation of all presented oral testimony. A reasonable time limit may be placed on such testimony from the public which in any event shall be not less than three minutes per person.

(e) The board shall comply with chapter 92, Hawaii Revised Statutes, as amended.

(f) Special meetings may be called by the chairperson, the director, or a majority of the board members at any time and place as scheduled.

(g) Emergency meetings and executive meetings may be held pursuant to chapter 92, Hawaii Revised Statutes, as amended.

(h) Public hearings may be held after thirty days notice, published pursuant to section 1-28.5, Hawaii Revised Statutes.

(i) Executive meetings closed to the public may be held by the board upon affirmative vote, taken at an open meeting of two thirds of the members present; provided the affirmative vote constitutes the majority to which the board is entitled. The meeting closed to the public shall be limited to matters specifically allowed by law and the reason for holding such a meeting shall be publicly announced and the vote of each member on the question of holding the meeting closed to the public shall be recorded and entered into the minutes of the meeting.

(j) Social, informal gatherings of two or more members of the board where official business is not discussed shall be considered chance meetings and not subject to these rules. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §§91-2, 92-4, 92-5)

§12-801-11 Quorum. A majority of all members to which the board is entitled shall constitute a quorum to transact business, and the concurrence of a majority of all members to which the board is entitled shall be necessary to take any action. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §92-15)

§12-801-12. Agenda. The board shall file an agenda with the county clerk at least six calendar days before the meeting. Nothing on the agenda can be changed without a two-thirds recorded vote of all members to which the board is entitled. An issue of major importance which may affect a significant number of persons must be listed on the agenda and not added on. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §92-7)

§12-801-13 Minutes. (a) The board shall keep written minutes of its meetings in summary form. The minutes may be prepared from an audio recordation of the meetings, such as a tape recording or any other means of sonic reproduction of the meetings. The board may vote:

- (1) to have the audio recordation of any meeting prepared in a specific manner; or
- (2) with the director's consent, to have a court reporter present at any specific meeting to transcribe the proceedings of that meeting. The audio recordation, if any, shall be retained by the board for a period of not less than five years after the date of the meeting.

(b) The minutes shall give a true reflection of the matters discussed at the meeting and the views of the members. The minutes shall include, but need not be limited to, the following information:

- (1) The date, time and place of the meeting;
- (2) The members of the board recorded as either present or absent;
- (3) The substance of all matters proposed, discussed, or decided; and a record, by individual member, of any votes taken; and
- (4) Any other information that any member of the board requests be included or reflected in the minutes.

(c) The written minutes and audio recordation, if any, shall be public records and shall be available within thirty days after the meeting, except where such disclosure would be inconsistent with section 92-5, Hawaii Revised Statutes, as amended, provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purposes of the executive meeting. Any person shall be entitled to a copy of the minutes or the audio recordation, if any,

provided that such person pays the costs incurred in the reproduction of the record. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §92-9)

§12-801-14 Decisions and orders. (a) All decisions and orders in a contested case proceeding or any other such proceeding authorized by chapter 91, Hawaii Revised Statutes, shall be signed by the chairman of the board. Members who have not heard and examined all of the evidence may vote and sign only after the procedures set forth in section 91-11, Hawaii Revised Statutes, have been complied with.

(b) Unless otherwise indicated in the order, the effective date of a decision and order shall be the date of mailing.

(c) Official copies of decisions and orders and other board actions shall be promulgated under the signature of all members or the chairperson, director or by such other person as may be authorized by the board.

(d) Except as provided in section 12-801-60 for decisions rendered after a contested case proceeding, all final decisions and orders shall be issued in writing within one hundred twenty days from the date the application is deemed complete by the director.

(e) All final decisions and orders shall contain a phrase informing the parties thereto of the time in which to appeal such order or decision.

(f) All administrative approvals shall be signed by the director.

(g) All other approvals, actions, decisions or communications shall be signed by the chairperson, or the director as his agent. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §§91-2, 91-11, 91-13.5)

§12-801-15 Board records. Records which are "government records" as defined in chapter 92F, Hawaii Revised Statutes, as amended, shall be disclosed according to the provisions of that chapter. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS Chapter 92F)

§12-801-16 Computation of time. In computing any period of time under the rules herein, by notice, or by

any order or regulation of the board, the time begins with the day following the act, event, or default, and includes the last day of the period unless it is a Saturday, Sunday or legal holiday in which event the period runs until the end of the next day which is not a Saturday, Sunday, or holiday. [Eff 12/30/99] (Auth: §HRS 91-2), (Imp: HRS; §91-2)

§12-801-17 Appearance before the board. (a) Any person or party to a proceeding before the board may appear in his or her own behalf or as an authorized representative of any other person. All attorneys who appear on behalf of any party before the board shall be licensed to practice in the State of Hawaii.

(b) Any person or party who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the board, by such act represents that the person or party is legally authorized to do so and shall comply with all applicable state and county laws and the rules of this board, and further, the person or party shall maintain the respect due the board and shall never deceive or knowingly present any false statements of fact or law to the board. The board may at any time require any person appearing before the board in a representative capacity to provide the board with qualification to act in such capacity. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-18 Formal requirements for filing of documents. (a) Time and place. All documents required to be filed with the board in any proceeding shall be filed with the board at the department of planning which is located at 250 South High Street, Wailuku, Maui, Hawaii 96793, within the appropriate time period as follows:

- (1) Variances for existing violations after notice of violation has been issued. A person who has been issued a notice of violation by the department that he is a violator, as defined in the department's rules for administrative procedures and civil fines for violations of titles 16, 18 or 19, Maui County Code.

- (2) Appeals from notices of violations. Appeals from any notice of violation, issued pursuant to the department's rules for administrative procedures and civil fines for violation of titles 16, 18 and 19, Maui County Code, shall be filed with the board within thirty days from the date of mailing or personal service of the notice of violation, whichever occurs sooner.
- (3) Appeals from other decision.
  - (A) Appeals from decisions or orders of any department charged with the enforcement of subdivision ordinances, other than appeals from any notice of violation issued pursuant to the department's rules for administrative procedures and civil fines for violation of titles 16, 18 and 19, Maui County Code, shall be filed with the board within fifteen days from the date that the subject decision or order is made in writing.
  - (B) Appeals from decisions or orders of any department charged with the enforcement of zoning and building ordinances, other than appeals from any notice of violation issued pursuant to the department's rules for administration procedures and civil fines for violation of titles 16, 18 and 19, Maui County Code, shall be filed with the board within thirty days from the date that the subject decision or order is made in writing.
- (4) Unless otherwise ordered, the date on which all required documents are received by the board at the department of planning which is located at 250 South High Street, Wailuku, Maui, Hawaii 96793, shall be deemed to be the date of filing.
- (b) Format.
- (1) Form and size. Documents shall be bound at the top and typewritten upon paper 8-1/2 x 11 inches or 8-1/2 x 13 inches in size. Tables, maps, charts, exhibits, or appendices may be larger and shall be folded to that size where practical. The impression shall be on one side of the paper only and shall be double spaced,

except that footnotes and quotations in excess of a few lines may be single-spaced. Copies shall be clear and permanently legible.

- (2) Title and number. Petitions, pleadings, briefs, and other documents shall show the title of the proceeding before the board and the name and address of the person or attorney.
- (3) Signatures. The original of each application, petition, complaint, answer, or amendment shall be signed in ink by each party or his or her counsel. If such party is a corporation or association, the pleading may be signed by an officer thereof.

(c) Copies. Unless otherwise required by these rules or the board, there shall be filed with the board an original and fifteen copies of each pleading or amendment thereof. Additional copies shall be provided if the chairperson of the board so requests.

(d) Extensions of time. Whenever a party is required to file a pleading within the period prescribed or allowed by these rules, by notice given hereunder or by an order or regulation, the board may:

- (1) for good cause before the expiration of the prescribed period, with or without notice to the parties, extend such period;
- (2) pursuant to a stipulation between all of the parties, extend such period;
- (3) permit the act to be done after the expiration of a specified period where the failure to act is clearly shown to be the result of excusable neglect.

All requests for continuances, except for stipulations, should be by written motion, unless it is made during the course of a hearing.

(e) Amended pleadings. All pleadings may be amended at any time prior to hearing. Amendments offered prior to hearing shall be served on all parties and filed with the board. All parties shall have the opportunity to answer and be heard on amendments filed after hearing commences, and the board shall decide whether such amendments shall be allowed.

(f) Retention of documents by the board. All documents filed with or presented to the board shall be retained in the files of the board. However, the chairperson of the board may permit the withdrawal of

original documents upon submission of properly authenticated copies to replace said original documents. [Eff 12/30/99; am and comp 2/24/05] (Auth: Charter §§8-8.7.4, 13-2.15) (Imp: HRS §91-2; Charter §8-8.7; MCC §§19.520.040, 19.520.050)

§12-801-19 Service. (a) By whom served. The director shall cause to be served all orders, notices, and other papers issued by the board together with any other papers required by law to be served by the board. Every other paper shall be served by the filing party.

(b) Upon whom served. All papers served by either the board or any other party shall be served upon all counsel of record at the time of such filing and upon all parties not represented by counsel or upon their designated agents, in fact or by law. Any counsel entering an appearance after the initiation of the proceeding shall so notify all other counsel then of record and all parties not represented by counsel.

(c) Service upon parties. The final order and any other paper required to be served by the board upon a party shall be served upon such party or upon his or her representative authorized to receive service of such papers.

(d) Method of service. Service of papers shall be made by first-class certified mail, or other means authorized by law.

(e) When service completed. Service by mail shall be regarded as complete when deposited in the United States mail properly addressed and stamped. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §§91-9.5, 91-11, 91-12)

§12-801-20 Officers and their duties. Presiding officer. The chairperson shall be the presiding officer of the board and the vice-chairperson shall act as the presiding officer in the absence of the chairperson. The presiding officer shall:

- (1) Open all meetings of the board at the appointed hour by taking the chair and calling the meeting to order;
- (2) Maintain order and proper decorum;
- (3) Announce the business before the board;

- (4) Review all matters properly brought before the board, call for votes upon the same and announce the results;
- (5) Appoint all hearings officers and any committee chairpersons with the approval of a proper majority of the members;
- (6) Authenticate by his or her signature all acts of the board as may be required by law, unless delegated to the director;
- (7) Do and perform such other duties as may be required by law, or such as may properly pertain to such office;
- (8) Make known all rules of order when so requested, and to decide all questions of order, subject to an appeal to the board. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-21 Committees. The board may appoint the necessary standing and select committees to discharge its responsibilities and functions. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-22 Voting. (a) Except as otherwise provided by law, all matters shall be determined by an affirmative vote of a majority of the membership to which the board is entitled.

(b) Whenever the board is ready to vote on any question, the chairperson shall state the question, put the question to a vote, and announce the results to the board.

(c) Unless a present member is disqualified from voting pursuant to section 12-801-23 herein, a member's silence or refusal to vote shall be recorded as an affirmative vote.

(d) The board shall render a decision on a variance within sixty days from the close of the public hearing on such variance, otherwise the variance shall be deemed granted. The foregoing shall not apply:

- (1) When review of the variance application is conducted pursuant to the intervention, contested case, and post hearing procedures set



forth in subchapters 3, 4, and 5 of these rules;

- (2) During any period in which matters relating to the variance application have been referred by the board to an agency or community organization for review and comment pursuant to section 12-801-67.1;
- (3) When review of the variance application has been delayed or deferred due to inadequate information concerning the nature, scope, or description of the subject matter of the variance application or due to revision of the variance application; or
- (4) When review of the variance application has been deferred at the request of applicant or delayed as a result of the nonappearance of applicant or applicant's representative at a board meeting. [Eff 12/30/99; am 9/10/00; am 3/10/02; am and comp 2/24/05] (Auth: Charter §§8-8.7.4, 13-2.15) (Imp: HRS §§91-2, 91-13.5; Charter §8-8.7; MCC §§19.520.040, 19.520.050)

§12-801-23 Disclosure of conflict. Whenever a member has a conflict of interest, the affected member shall promptly make a full disclosure of the circumstances to the board and refrain from participation in discussion and voting. [Eff 12/30/99] (Auth: HRS 91-2) (Imp: HRS §91.2)

§12-801-24 Motions. (a) Motions and amendments by board members may be verbal, but shall be reduced to writing if requested by the chairperson.

(b) No motion shall be received and considered by the board until the same has been seconded.

(c) After a motion is stated or read by the chairperson, it shall be deemed in the possession of, and shall be disposed of by vote of the board. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-25 Question of order. A question of order may be raised at any stage of the proceedings, except during a calling of the roll when the ayes and noes are

called for. The question shall be decided by the chairperson, without debate, subject to an appeal to the board. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-26 Attendance. No member shall be absent from the service of the board, unless the member is sick or otherwise unable to attend. If a member will be absent, the member shall advise the chairperson or the board clerk not less than twenty-four hours prior to the meeting. If a member has two consecutive unexcused absences, or six unexcused absences in one twelve month period, the board shall send a letter to the office of the mayor to inform the mayor of the absences. An absence is deemed unexcused when the member fails to provide the requisite notice within the time specified, except in cases of an emergency. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

### SUBCHAPTER 3

#### INTERVENTION AND CONTESTED CASES

§12-801-27 Petition; filing. Petitions to intervene shall be in conformity with section 12-801-18 and shall be filed with the board and served upon the applicant within a reasonable time before the meeting in which the subject matter of the intervention is to be heard. Untimely petitions will not be permitted except for good cause, but in no event after the board has taken the final vote on the matter before it. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-801-28 Intervenors. (a) All departments and agencies of the state and the county shall be admitted as parties upon timely application for intervention.

(b) All persons who have a property interest in land subject to board action, who lawfully reside on said land, or who can demonstrate that they will be so directly and immediately affected by the matter before the board that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application for intervention.

(c) All other parties may apply to the board for leave to intervene as parties.

(d) Leave to intervene shall be freely granted, provided that the board or its hearing officer, if one is appointed, may deny an application to intervene when in the board's or hearing officer's sound discretion it appears that:

- (1) The position or interest of the applicant for intervention is substantially the same as a party already admitted to the proceeding;
- (2) The admission of additional parties will render the proceedings inefficient and unmanageable; or
- (3) The intervention will not aid in development of a full record and will overly broaden issues. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-801-29. Multiple intervenors. If more than one intervenor is admitted to a contested case proceeding, the hearing officer and/or board may require intervenors to assign responsibilities between themselves for the examination and cross-examination of witnesses. The hearing officer or board shall have the right to impose reasonable subject matter, as well as time, limitations on examination and cross-examination of witnesses, whether or not parties are represented by counsel. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-30. Contents of petition. The petition shall contain the following:

- (1) Nature of petitioner's statutory or other right;
- (2) Nature and extent of petitioner's interest and, if an abutting property owner, the tax map key description of the property; and
- (3) Effect of any decision in the proceeding on petitioner's interest.

If applicable, the petition shall also make reference to the following:

- (4) Other means available whereby petitioner's interest may be protected;
- (5) Extent petitioner's interest may be represented by existing parties;
- (6) Extent petitioner's interest in proceeding differs from that of the other parties;
- (7) Extent petitioner's participation can assist in development of a complete record;
- (8) Extent petitioner's participation will broaden the issue or delay the proceeding; and
- (9) How the petitioner's intervention would serve the public interest. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-31. Opposition to intervention. If any party opposes the petition for intervention, that party shall file a motion to oppose on the board, all other parties, and the intervenor within five days after being served. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-32. Hearing. All petitions to intervene shall be heard prior to rendering a decision. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-33 Appeal from denial. A person whose petition to intervene has been denied may appeal such denial to the circuit court pursuant to chapter 91-14, Hawaii Revised Statutes. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

## SUBCHAPTER 4

### CONTESTED CASE PROCEDURES

§12-801-34 Purpose. This subchapter governs contested case procedures before the board. These procedures may be modified or waived by the parties with the consent of a majority of the board or presiding officer, as the case may be. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-801-35 Pre-hearing procedures. All parties to a contested case shall be prepared for a pre-hearing conference and a contested case hearing within a reasonable time, as determined by the hearing officer. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-801-36 Hearing officer, powers. In all contested case proceedings, the chairperson, one or more members or any other person may be a hearing officer duly appointed and designated to preside at the hearing.

The hearing officer shall have the power to administer oaths, receive and rule on questions of evidence, set the dates for and hold prehearing conferences to formulate or simplify the issues, rule upon all objections or motions which do not involve a final determination of the proceeding, receive offers of proof, fix the length, form and time for the filing of briefs, dispose of any other matter that normally and properly arises in the course of a hearing, and take lawful action deemed necessary to the orderly and just conduct of a hearing. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-801-37 Notice of hearing. Unless otherwise provided by law, the notice of hearing shall be served on all parties and persons who are entitled to such notice at their last recorded address as required by sections 91-9 and 91-9.5, Hawaii Revised Statutes, at least fifteen days prior to hearing. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §§91-9, 91-9.5)

§12-801-38 Transcripts. Should any of the parties to a contested case either requests transcripts be provided or appeal the decision of the board, the hearing officer shall fairly allocate the transcription costs between the applicant, intervenors and the board. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-801-39 Limiting testimony. To avoid unnecessary cumulative evidence, the presiding officer may limit the number of witnesses or the time for testimony upon a particular issue. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-801-40 Removal from proceeding. Any person or persons who willfully disrupts a hearing or otherwise compromises the conduct of the hearing shall be removed from the hearing room. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-801-41 Order of procedure. In hearings on applications and petitions, the applicant shall open and close. Intervenors shall be heard in such order as the hearing officer directs. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-42 Co-counsel. Where a party is represented by more than one counsel, they may allocate witnesses between them, but only one counsel shall be permitted to cross-examine a witness or to state any objections or to make closing arguments. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-801-43 Cross-examination. Each party shall have the right to conduct such cross-examination of the witnesses as may be required for a full and true disclosure of the facts and shall have the right to submit rebuttal evidence. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §§91-9, 91-10)

§12-801-44 Subpoenas. Requests for the issuance of subpoenas, requiring the attendance of witnesses or the production of documents or records, shall be presented to the hearing officer in writing, and shall state the reasons why the testimony or documents required are material and relevant. Only parties or the hearing officer may request the issuance of a subpoena.

All subpoenas shall be presented to the hearing officer not less than ten calendar days before the scheduled hearing, unless otherwise ordered.

No subpoena shall be issued unless the requesting party has complied with this section and gives the name and address of the subpoenaed witness and a complete description of the documents sought to be produced. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §§91-9, 92-16)

§12-801-45 Fees and mileage. Witnesses summoned by subpoena shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State of Hawaii, and such fees and mileage shall be paid by the party who requested the subpoena be issued. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §92-16)

§12-801-46 Oath. Witnesses shall be placed under oath or affirmation before testifying. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §92-16)

§12-801-47 Consolidation. The board, upon its own initiative or upon motion, may consolidate for hearing or for other purposes, or may contemporaneously consider, two or more proceedings which involve substantially the same parties or issues which are the same or closely related if it finds that the consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-48 Substitution of parties. Upon motion and for good cause, the board may order substitution of parties, except that in the case of death of a party,



substitution may be ordered without the filing of a motion. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-49 Motions. (a) Time. Motions may be made before, during or after a contested case hearing.

(b) Form; contents. All motions other than those made during a hearing shall be made in writing to the board or hearing officer, and shall state the relief sought and be accompanied by an affidavit or legal memorandum setting forth the grounds upon which they are based. The board or hearing officer shall set the time for hearing the motion.

(c) Service of motions. The moving party shall serve a copy of all motion papers on all other parties and shall file with the board or hearing officer the original with proof of service.

(d) Memorandum in opposition. A memorandum in opposition or counter affidavit shall be served on all parties no less than two days before the hearing date. The original and proof of service shall be filed with the board or hearing officer. The chairperson of the board or hearing officer may extend or shorten the times herein for good cause.

(e) Waiver. Failure to serve or file a memorandum in opposition to a motion or failure to appear at the hearing without good cause may be deemed a waiver of objection to the granting or denial of the motion. A party who does not oppose the motion shall notify the hearing officer and opposing counsel or party promptly. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-50 Discovery. The parties to a contested case may request discovery in a manner consistent with rules 26 through 32, 34, 36, and 37, Hawaii Rules of Civil Procedure. The chairperson of the board will allow utilization of the discovery process where appropriate and where such would not unreasonably delay the proceedings. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-51 Informal settlements, mediation and arbitration. (a) In order to encourage and provide opportunities for settlement of disputes, there may be held at any time prior to or during contested case hearings, such informal conferences among the parties for the purpose of submission and consideration of facts, arguments, or offers of settlement, as the nature of the proceedings, time and public interest may permit. Nothing herein shall prevent the parties from voluntarily submitting factual issues to mediation or arbitration so long as the submission does not result in an improper delegation of powers of the board or prevent the board from making the final decision in the matter.

(b) Any party may submit an offer of settlement to any other party or request conferences for such purposes at any time.

(c) Rejected offers or proposals shall be privileged and shall not be admissible in evidence against any counsel or person claiming that privilege. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-52 Evidence. (a) Form and admissibility. The hearing officer shall not be bound by the rules of evidence, but may exercise his or her own discretion with a view to doing substantial justice.

(b) Ruling. The hearing officer shall rule on the admissibility of all evidence. Such rulings may be reviewed by the board in determining the matter of the merits.

(c) Objections and exceptions. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

(d) Offer of proof. An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

(e) Exhibits. Exhibits shall conform to the provisions of subsections 12-801-18(b) and (c), where applicable, and shall be filed with the hearing officer.

(f) Board records. If any matter contained in a document on file as a government record is offered in evidence, such document need not be produced as an exhibit, but may be received in evidence by reference,

provided that the particular portions of such document are specifically identified and otherwise competent, relevant and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy thereof shall be presented as an exhibit, unless otherwise ordered by the hearing officer.

(g) Official notice. Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts within the board's specialized knowledge when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

(h) Additional evidence. The hearing officer may require the production of further evidence upon any issue. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-9)

§12-801-53 Correction of transcript. Motions to correct the transcript will be acted upon by the hearing officer or the board, as the case may be. Motions shall be filed within seven days after receipt of the transcript unless otherwise directed and shall be served on all parties. Such motions shall certify the date when the transcript was received. If no objections are received within ten days after date of service, the transcript will, upon approval of the board, be changed to reflect such corrections. If objections are received, the motion will be acted upon with due consideration to the stenographic transcript of the hearing. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

## SUBCHAPTER 5

### POST HEARING PROCEDURES

§12-801-54 Briefs. The hearing officer may fix the time for the filing of briefs. Exhibits may be reproduced in an appendix. A brief of more than twenty pages shall contain a subject index and table of authorities. Requests for extension of time to file briefs must be made to the hearing officer in writing, and a copy thereof served upon or mailed to the other parties to the proceeding. When a matter is to be submitted on concurrent briefs, extensions will not be granted unless a stipulation is filed with the board. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-55 Oral arguments. The board may direct or permit the presentation of oral argument, with the applicant opening and concluding the argument. Not more than one hour on each side of the proceeding will be allowed for argument without special leave of the board. If more than one person is participating on a side of the proceeding, those parties shall divide the hour. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-56 Recommendations of hearing officer. (a) Submission of recommendations. Upon completion of the contested case the hearing officer shall prepare and submit to the board the record of the hearing and a report setting forth findings of fact, conclusions of law, and a proposed decision and order.

(b) Contents of record. The record shall include the application, notice of hearing, motions, rulings, orders, a transcript of the hearing, documentary evidence, proposed findings and objections, the report of the hearing officer, and all other matters placed in evidence.

(c) Service of hearing officer's report. The hearing officer's report and proposed decision and order shall be served upon all parties. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-57 Exceptions to hearing officer's report and recommendations. (a) File; form; copies; time; service. Within ten working days after service of the report and proposed decision and order, a party may file with the board exceptions and a memorandum in support thereof. Copies shall be served upon each party to the proceeding.

(b) Contents of exceptions; waiver. The exceptions shall:

- (1) Set forth specifically the grounds for each exception.
- (2) Identify the objectionable portions of the hearing officer's report and recommended order.
- (3) Identify the portions of the record relied upon by page citation.
- (4) Grounds not stated and identified in the report and record are waived. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-58 Support of hearing officer's report and recommendations. (a) File; form; copies; time; service. Within ten working days after service of the exceptions, a party may file with the board a brief in support of the hearing officer's recommendations. Copies shall be served upon each party to the proceeding.

(b) Contents of support brief. The support brief shall:

- (1) Answer specifically the points to which exceptions were taken.
- (2) State the facts and reasons why report and recommendations must be affirmed.
- (3) Designate by page citation the portions of the report record relied upon. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-2)

§12-801-59 Board action. (a) If no statement of exceptions is filed as herein provided, the board may proceed to reverse, modify, or adopt the recommendations of the hearing officer.

(b) Upon filing of the exceptions and briefs together with the briefs in support, the board may render its decision forthwith upon the record; or if oral argument has been allowed, after oral argument; or may

reopen the docket and take further evidence or may make other disposition of the case that is necessary under the circumstances. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §§91-2, 91-11)

§12-801-60 Issuance of decisions and orders. A proceeding shall stand submitted for decision by the board after the taking of evidence, the submission of a report by the hearing officer, and the filing of such briefs or the presentation of such oral argument as may have been allowed. A party to the proceeding may submit a proposed decision and order which shall include proposed findings of fact. Said proposals shall be mailed to each party to the proceeding and an opportunity given to each party to comment thereon.

Every decision and order adverse to a party to the proceeding, rendered by the board in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the board shall incorporate in its decision a ruling which addresses such findings. Such decisions and orders in contested cases shall be rendered within forty-five days from the presentation of oral argument by the parties. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §§91-12, 91-13.5)

§12-801-61 Service of decisions and orders. Decisions and orders shall be served by mailing certified copies to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a certified copy thereof. When a party to an application proceeding has appeared by a representative, service upon the representative or counsel shall be deemed to be service upon the party. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-12)

§12-801-62 Appeals. Parties to proceedings before the board may obtain judicial review of decision and ordered issued by the board in the manner set forth in chapter 91-14, Hawaii Revised Statutes. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-14)

## SUBCHAPTER 6

### RULE MAKING PROCEDURES AND DECLARATORY RULINGS

§12-801-63 Board. All rules and regulations of the board shall be adopted by the board and approved by the mayor in accordance with Hawaii Revised Statutes; provided, however, that such procedure shall not be applicable to regulations concerning only the internal management of the department or the board not affecting the private rights of or procedures available to the public, to declaratory rulings, or to intra-agency memoranda. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §§91-1(4), 91-3)

§12-801-64 Petition and procedures for adoption, amendment, or repeal of rules and regulations. (a) The board may adopt, amend, or repeal any of its rules by following the procedures outlined herein, except that the board need not formally file a petition and need only submit a draft of the proposed changes.

(b) Any interested person may petition the board requesting the adoption, amendment, or repeal of any provision of these rules.

(c) Filing of petition.

(1) Any person seeking the adoption, amendment, or repeal of these rules shall file a petition with the department on a form provided by the department, which petition shall include or be accompanied by the following information and documentation:

- (A) A statement of the nature of the applicant's interest;
- (B) A draft of the proposed rule or amendment or a designation of the provisions sought to be repealed;
- (C) Statement of the reasons in support of the petition; and
- (D) A public hearing and notice fee of \$250.

(2) Upon receipt of all required fees, information, and documentation, the director shall certify

that the applicant's petition is complete and shall refer the petition to the board.

(d) Disposition of petition. After the director finds that the application is complete, the application shall be referred to the board. The petition shall be considered submitted to the board as of the first meeting it is properly placed on the agenda. Within thirty days after submission the board shall either deny the petition in writing and state the reasons for such denial or initiate proceedings for action according to the provisions herein.

(e) Public hearing; notice. When the board proposes to adopt, amend, or repeal a rule, it shall schedule a public hearing by giving thirty days notice. Notice shall include a statement of the substance of the proposed rule, and the date, time, and place where interested persons may be heard. Notice shall be published pursuant to section 1-28.5, Hawaii Revised Statutes, and shall be mailed to all persons who have made a timely, written request of the board for advanced notice of its rulemaking proceedings.

(f) Scope. All interested persons shall be given the opportunity to submit data, views, or written or oral argument. The board shall incorporate in the record and consider all written or oral submissions regarding the proposed rule.

(g) Decision. The board may make its decision at the public hearing or announce then the date it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency shall, if requested to do so by an interested person, issue a concise statement of reasons for and against its determination.

(h) Mayoral approval. The adoption, amendment, or repeal of any rule by any county agency shall be subject to mayoral approval.

(i) Emergency rules. If the board finds an imminent peril to public health or safety requires adoption, amendment, or repeal of a rule upon less than twenty days notice of hearing, and states its reasons in writing, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing as practicable.

(j) Filing; effect. Upon mayoral approval, certified copies of all rules shall be filed in the



office of the county clerk and shall become effective ten days thereafter.

(k) Emergency rules; effect; notice. Emergency rules shall be effective upon filing, but for not longer than one hundred twenty days without renewal. The board shall publish a copy of the emergency rule within five days of filing herein. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §§1-28.5, 91-3, 91-4, 91-6)

§12-801-65 Declaratory rulings. (a) Applicability. Any interested person may petition the board for a declaratory order as to applicability of any statutory provision or of any rule or order of the department or the board.

(b) Filing of petition.

- (1) Any person seeking a declaratory ruling shall file a petition with the department on a form provided by the department, the petition shall include or be accompanied by the following information and documentation;
    - (A) The name, address, and telephone number of the applicant;
    - (B) A statement of the nature of applicant's interest, including reasons for the submission of the petition;
    - (C) A designation of the specific provision, rule or order in question;
    - (D) A complete statement of facts;
    - (E) A statement of the position or contention of the applicant; and
    - (F) A memorandum of authorities including any legal authorities, containing a full discussion of the reasons in support of such position or contention.
  - (2) Upon receipt of all required information and documentation, the director shall review the petition for completeness and refer the petition to the board.
- (c) Disposition of petition.
- (1) The board may for good cause refuse to issue a declaratory ruling where:
    - (A) The question is speculative or purely hypothetical and does not involve existing

facts, or facts that can reasonably be expected to exist in the near future.

(B) The applicant's interest is not of the type which would give the applicant standing to maintain an action if the applicant were to seek judicial relief.

(C) The issuance of the declaratory ruling may adversely affect the interests of the County, the board, the department or any of their officers or employees in any litigation which is pending or may reasonably be expected to arise.

(D) The matter is not within the jurisdiction of the board.

(2) Where any question of law is involved, the board may refer the petition to the department of the corporation counsel. The board may also refer the petition to other agencies where it deems it necessary or desirable.

(3) The board shall promptly notify the applicant of the disposition of the petition.

(d) Status of orders. Orders disposing of petitions shall have the same status as other agency orders. Orders shall be applicable only to the factual situation alleged in the petition or set forth in the order. They shall not be applicable to different factual situations or where additional facts not considered in the order exist. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: HRS §91-7)

## SUBCHAPTER 7

### VARIANCES

§12-801-66 Applicant. (a) The applicant for a variance shall be the owner or lessee, who holds a recorded lease with an unexpired term of not less than five years from the date of the filing of the application with the director. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC Chapter 19.520)

§12-801-67 Contents of application. The application shall include the following:

- (1) Name, address and telephone number of applicant;
- (2) Nature of the variance requested;
- (3) Applicable ordinances, rules, or regulations which pertain to the application;
- (4) Conditions, circumstances and provisions which support the granting of the application which are specified in subchapter 8 and the Maui County Code;
- (5) All previously approved building permits and violation notices for the subject parcel if applicable;
- (6) Dated photographs of the site or structure which relate to the variance request;
- (7) Notice of application which is in a form prescribed by the director and an affidavit certifying that this notice was mailed by certified mail, return receipt requested, to all owners and lessees adjacent to and across the street from the subject property. The notice of application shall include the following:
  - (A) The name, address and telephone number of the applicant;
  - (B) A brief description of the existing uses and uses for which the application was filed;
  - (C) A location map and a description of the location of the use which the applicant has applied for and the tax map key number

- and street address, if available, of the subject property; and
- (8) Drawings stamped, prepared by, or under the supervision of a licensed engineer, surveyor or architect, if applicable;
  - (9) A site plan drawn to scale which shows, if applicable:
    - (A) Property lines and easements, with dimensions and area calculations, of the subject property;
    - (B) Location, size, spacing, setbacks, and dimensions of existing and proposed buildings, structures and improvements;
    - (C) The building elevations, sections and floor plan and site sections which clearly define the character of the development;
    - (D) The existing and proposed landscaping plans which show open spaces, plants and trees;
    - (E) The existing streets which access the property and all proposed roads and parking area, with dimensions; and
    - (F) The shoreline, shoreline setback lines, stream and other setback lines.
  - (10) A description of the existing and proposed floor area, parking and loading calculations and areas of the subject property, if appropriate;
  - (11) All other information, as required by the department of planning necessary for processing of the application;
  - (12) All topographic information which show existing features and conditions and any proposed grading, if applicable. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC Chapter 19.520)

§12-801-67.1 Referral of matters relating to variance application. The board may refer matters relating to the variance application to an agency or community organization for review and comment. [Eff 3/10/02] (Auth: Charter §§8-8.7.4, 13-2.15) (Imp: Charter §8-8.7.1; MCC §19.520.050)

§12-801-68. Contents of application for flood hazard districts. In addition to the content requirements of section 12-801-67, variance applications from chapter 19.62, Maui County Code, shall include the following:

- (1) Plans and specifications showing: the size and location; dimensions of all property lines and topographic elevation of the lot; existing and proposed structures and improvements, fill, and storage areas; location and elevations of existing and proposed streets and utilities; floodproofing measures; relationship of the site to flood boundaries; and existing and proposed flood control measures and improvements.
- (2) Cross-sections and profile of the area and the base flood elevations based on mean sea level.
- (3) Flood study and drainage report.
- (4) Description of surrounding properties and existing structures and uses, and the effect of a base flood as a result of the variance.
- (5) Justification for the variance with consideration of the intent and provisions of this chapter and information on the impact the variance would have on the factors listed in subsection 19.62.140.C, Maui County Code; and proposed mitigative measures.
- (6) An agreement to insert and record covenants in the conveyance and title documents of the property that the property is located in a special flood hazard area and is subject to flooding and flood damage. The covenants shall contain statements attesting to all adverse effects resulting from the variance. The covenants shall also state that the property owner or owners and assigns shall not file any lawsuit or action against the county for costs or damages or any claim, and shall indemnify and save harmless the county from any liability when such loss, damage, injury, or death results due to the flood hazard variance and flooding of the property. Upon approval of the flood hazard variance, such covenants shall be fully executed and submitted to the director for approval. Upon approval, the applicant shall file the covenants with the bureau of

conveyances. [Eff 12/30/99] (Auth: HRS §91-2)  
(Imp: MCC §19.62.140)

§12-801-69 Processing fee. All applications shall include a processing fee in the amount set forth in the annual budget of the county, except that no processing fee shall be required for applications filed by county agencies. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC Chapter 19.520)

§12-801-70 Reapplication for variance. The board shall not consider any application for a variance covering substantially the same request as had previously been denied by the board within one year of the date of filing findings of fact and conclusions of law denying the application unless the petitioner submits significant new data or additional reasons which substantially strengthen the applicant's position, provided that in no event shall any new application be accepted within six months of the date of filing the findings of fact and conclusions of law. [Eff 12/30/99] (Auth: HRS §92-15; Maui County Charter §8-5.4.4) (Imp: HRS §91-2)

§12-801-71 Standards for comprehensive zoning. The board shall apply the following standards to determine whether to issue a variance:

(1) That there is an exceptional, unique or unusual physical or geographical condition existing on the subject property which is not generally prevalent in the neighborhood or surrounding area and the use sought to be authorized by the variance will not alter the essential character of the neighborhood.

(2) Strict compliance with the applicable provisions of this title would prevent unreasonable use of the subject property, and

(3) That the conditions creating a hardship were not the result of previous actions by the applicant. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC Chapter 19.52)

§12-801-72. Standards for interim zoning. The board shall apply the following standards to determine whether to issue a variance:

- (1) Strict enforcement of any provision of this article would involve practical difficulty or unnecessary hardship; and
- (2) Desirable relief may be granted without being detrimental to the public interest, convenience and welfare. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC Chapter 19:02)

§12-801-73 Standards for outdoor signs. The board shall apply the following standards to determine whether to issue a variance:

- (1) Variance would not be materially detrimental to the property owners in the vicinity;
- (2) Variance would prevent an unreasonable hardship caused by a physical condition unique to the real property on which the sign is to be placed, as compared with other properties in the vicinity; provided that the hardship was not caused by action or inaction of the applicant or the applicant's predecessor in interest; and provided, further, that neither building design, nor an existing sign, shall constitute a unique condition.
- (3) Granting variance would not be contrary to the purposes of this chapter. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC Chapter 16.12A)

§12-801-74 Standards for subdivisions. The board shall apply the following standards to determine whether to issue a variance:

- (1) Special geographical or physical circumstances or conditions affecting the property that are not common to all property in the area.
- (2) Variance is necessary for the preservation and enjoyment of a substantial property right of the petitioner and extraordinary hardship would result from strict compliance with the provisions of this title because of the special geographical or physical circumstances or conditions affecting the property.

- (3) Special circumstances or conditions affecting the property are not the result of previous actions pertaining to the subdivision.
- (4) Granting of variance shall not be detrimental to the public health, safety, or welfare or injurious to other property in the vicinity of said property.
- (5) The property has obtained an appropriate zoning designation, provided, that for purposes of this chapter, districts with interim zoning shall not be considered an appropriate zoning. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC Chapter 18.32)

§12-801-75 Standards for building, fire, housing, electrical and plumbing codes. The board shall apply the following standards to determine whether to issue a variance:

- (1) That the strict application, operation or enforcement of the code provision or provisions appealed from would result in practical difficulty or unnecessary hardship to the applicant.
- (2) That the granting of the variance shall not be detrimental to the public health, safety or welfare.
- (3) That the granting of the variance would not be injurious to the adjoining lots and the buildings thereon.
- (4) That the granting of the variance would not be contrary to the purposes of this code and the public interest. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC Chapters 16.04A, 16.08, 16.18, 16.20A and 16.26A)

§12-801-76 Standards for flood hazard districts. The board shall apply the following standards to determine whether to issue a variance:

- (1) Variances shall be issued only upon a determination that the variance is peculiar to the property involved and is the minimum necessary to afford relief to the applicant



with minimum deviation from the requirements of the chapter.

- (2) Variances shall be issued only upon:
  - (A) a showing of good and sufficient cause;
  - (B) a determination that failure to grant the variance would result in exceptional hardship to the applicant; and a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, defraud or victimize the public, or conflict with existing county or state laws. Mere economic or financial hardship, or inconvenience, or aesthetic preferences, shall not, by themselves, constitute a finding of exceptional hardship.
- (3) Variances shall not be issued within any designated floodway if any increase in base flood levels would result.
- (4) Variances may be issued for new construction, substantial improvements, and other proposed new developments to be erected on a lot of one-half acre or less in size contiguous to, and surrounded by, lots with existing structures constructed below the base flood level, provided that the procedures of sections 19.62.050 and 19.62.060, Maui County Code, have been fully considered. For lots greater than one-half acre, the technical justification required for issuing the variance shall be greater.
- (5) Variances may be issued for the repair or rehabilitation of historic structures upon a determination that the proposed repair or rehabilitation will not preclude the structure's continued designation as a historic structure and the variance is the minimum necessary to preserve the historic character and design of the structure.
- (6) Variances may be issued for new construction, substantial improvements, and other proposed new developments necessary for the conduct of a use that cannot perform its intended purpose

unless located in close proximity to water. Such uses shall include only docking facilities, port facilities necessary for the loading and unloading of cargo or passengers, and ship building and ship repair facilities (but not long-term storage or manufacturing facilities); provided that the provisions of subsection 19.62.140.B, Maui County Code, are satisfied and that the structure or other development is protected by methods that minimize base flood damage and create no additional threats to public safety. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC 19.62.140)

§12-801-76.1 Conditions. In approving an application for a variance, the board may impose conditions necessary to prevent any detriment to the public interest, health, safety, convenience, or welfare, and to ensure substantial compliance with representations made by the applicant. Conditions imposed may include, but shall not be limited to, the following:

- (1) That the variance shall be applicable only to the request(s) as approved by, and as reflected in the record of, the board; and
- (2) That the owner, its successors and permitted assigns, shall indemnify and hold the County harmless from and against any loss, liability, claim or demand arising out of the variance, and shall procure, the owner's own cost and expense, and shall maintain during the entire period of the variance, a policy or policies of comprehensive liability insurance naming the County as a named additional insured, insuring and defending the applicant and County of Maui against any and all actions, suits, damages and claims, for property damage, personal injury and/or death arising out of the variance or occasioned by any act or nuisance made or suffered in connection with the variance, and insuring and defending against all actions, suits, damages and claims by whomsoever brought or made by reason of the non-observance or non-performance of any of the terms and conditions

of the variance. The insurance policy shall provide coverage in the minimum amount of \$1,000,000; provided that the board may reduce the required coverage amount for good cause shown.

- (3) That copies of a hold harmless agreement and the policy naming County of Maui as a named additional insured shall be submitted to the planning department within ninety calendar days from the date of transmittal of the decision and order. [Eff and comp 2/24/05] (Auth: Charter §§8-8.7.4, 13-2.15) (Imp: HRS §§91-2, 91-13.5; Charter §8-8.7; MCC §§19.520.040, 19.520.050)

## SUBCHAPTER 8

### NOTICES OF APPLICATION AND PUBLIC HEARING FOR VARIANCES

§12-801-77 Notice of application. The applicant for a variance shall prepare a notice of application and legible map depicting the subject property and the parcels adjacent to and across the street from the subject property (such as a tax map or street map). The form of the notice shall be provided to the applicant by the department. Prior to mailing, the notice of application shall be reviewed and approved by the department. At the time of application, the applicant shall mail the notice of application to all owners and lessees adjacent to and across the street from the subject property. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC §19.520.050)

§12-801-78 Notice of public hearing. Within ten days after the receipt of the variance application, the director shall schedule the public hearing provided the application is determined to be complete. The variance application shall be returned to the applicant if it is determined to be incomplete. The public hearing notice shall be published as follows:

- (1) Not less than thirty days prior to the public hearing, the director shall publish a notice of the date, time, place and subject matter of the public hearing;
- (2) Not less than thirty days prior to the public hearing date for the variance, the applicant shall transmit a notice of public hearing by certified mail, return receipt requested, of the date, time, place and subject matter of the public hearing to the owners and lessees of record adjacent to and across the street from the subject property. The applicant shall submit return receipts for the certified mail to the director not less than ten business days prior to the date of the public hearing. The applicant shall submit any updated names and addresses of these owners and lessees derived from the return receipts received on the

- notices of application previously mailed to these owners and lessees; and
- (3) The applicant shall publish a copy of the notice of public hearing once per week for three consecutive weeks prior to the public hearing date in a publication which is printed and issued at least twice weekly in the county and which is generally circulated throughout the county. The intervals between the public hearing notices shall be not less than six days. The applicant shall submit written confirmation that the notice requirements have been fulfilled. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC §19.520.050)

## SUBCHAPTER 9

### APPEALS TO THE BOARD

§12-801-79 Appeals. An appeal permitted by law from the decision or order of any department to the board may be taken by the filing of a notice of appeal with the board, together with the fee specified in section 12-801-82, within the time period specified by law. Where no such time period is specified, the appeal shall be filed not later than thirty days after the date of the written decision or order from which appeal is sought. [Eff 12/30/99, am and comp 2/24/05] (Auth: Charter §§8-8.7.4, 13-2.15) (Imp: Charter §8-8.7.2; MCC §§5.24.100, 13.04.125, 19.520.040)

§12-801-80 Contents of the notice of appeal. The notice of appeal shall:

- (1) Identify the party or parties taking the appeal;
- (2) Designate the order or decision appealed from, and provide a copy of the order or decision attached as an exhibit;
- (3) Have affixed to it proof that service of the notice of appeal was made on all parties to the appeal in the manner required by section 12-801-85. Administrative staff for the board shall permit a notice of appeal to be filed without the proof of service, but the person who filed the notice of appeal shall file the proof of service within seven days after the filing of the notice of appeal;
- (4) A concise statement setting forth the nature of the appeal, the facts material to consideration of the appeal presented, the alleged error committed by the agency, and any relevant statutes, ordinances, or administrative rules pertaining to the matter under appeal;
- (5) If the appeal is from a decision or order relating to the enforcement of zoning, subdivision, or building ordinances, the following information shall also be provided:
  - (A) Documents identifying the owner of the subject parcel of land;

- (B) Owner's name, address and, if available, telephone numbers;
- (C) Agent's name, address and telephone numbers, if applicable;
- (D) Tax map key number of the parcel and its street address, if available;
- (E) Locational map identifying the site, adjacent roadway, and identifying landmarks. [Eff 12/30/99, am and comp 2/24/05] (Auth: Charter §§8-8.7.4, 13-2.15) (Imp: Charter §§8-8.7.2, 8-8.7.3; MCC §19.520.040)

§12-801-80.1 Procedure concerning appeals. The board shall hold a contested case hearing on the appeal. The director whose decision or order is being appealed, the appellant, and, where the appellant is someone other than the applicant, the applicant shall be parties to the proceedings. Subchapters 3, 4 and 5 of these rules, relating to intervention, contested case procedures, and post hearing procedures, respectively, shall govern the proceedings. [Eff 3/10/02, am and comp 2/24/05] (Auth: Charter §§8-8.7.4, 13-2.15) (Imp: Charter §8-8.7.2; MCC §19.520.040)

§12-801-81 Standards of appeal. Unless otherwise provided by law, the board shall review the decision or order under appeal and may affirm the decision or order or remand the case to the hearing officer, if any, with instructions for further proceedings; or the board may reverse the decision or order if the substantial rights of the petitioner may have been prejudiced because the decision or order is:

- (1) Based on a clearly erroneous finding of material fact or erroneous application of the law; or
- (2) Arbitrary or capricious in its application; or
- (3) A clearly unwarranted abuse of discretion. [Eff 12/30/99, am 3/10/02, am and comp 2/24/05] (Auth: Charter §§8-8.7.4, 13-2.15) (Imp: Charter §8-8-7.2, MCC §19.520.040)

§12-801-82 Processing fee. All applications for appeal shall include a processing fee in the amount set forth in the annual budget of the county; except that no processing fee shall be required for applications filed by county agencies. [Eff 12/30/99] (Auth: HRS §91-2) (Imp: MCC Chapter 19.520)

§12-801-83 Repealed. [R 2/24/05]

§12-801-84 Joint or consolidated appeals. If two or more parties are entitled to appeal from a decision or order of a department and their interests are such as to make joinder practicable, they may file a joint notice of appeal and thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the board upon the board's own motion, upon motion of a party, or upon stipulation of the parties to the several appeals. [Eff and comp 2/24/05] (Auth: Charter §§8-8.7.4, 13-2.15) (Imp: Charter §8-8.7.2; MCC §19.520.040)

§12-801-85 Service of the notice of appeal. Appellant shall serve a file-marked copy of the appeal by mail or delivery thereof to counsel of record for each other party, or, if a party is not represented by counsel, to the party at the party's last known address. [Eff and comp 2/24/05] (Auth: Charter §§8-8.7.4, 13-2.15) (Imp: Charter §8-8.7.2; MCC §19.520.040)